

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 464 of 1995

in
CIVIL APPLICATION NO. 625 OF 1995
in

SPECIAL CIVIL APPLICATION No 11031 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE P.B.MAJMUDAR

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : YES
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES
5. Whether it is to be circulated to the Civil Judge? : YES

STATE BANK OF SAURASTHRA

Versus

SD DAVE

Appearance:

MR MR DC RAVAL for Appellant

MRS MADHUBEN SHARMA for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE P.B.MAJMUDAR

Date of decision: 24/11/1999

ORAL JUDGEMENT

(Per : Panchal, J.)

This appeal, which is filed under Clause 15 of the Letters Patent is directed against order dated June 28, 1995 rendered by the learned Single Judge in Civil Application No.625/95, by which the appellant is directed to pay full wages last drawn by the respondent inclusive of all allowances admissible to him under the Rules from June 21, 1994 till date during stay of operation and implementation of award and order dated June 21, 1994 passed by the learned Presiding Officer, Industrial Tribunal (C), Ahmedabad in Reference (ITC) No.12/88.

2. The respondent joined service of the appellant-bank in the year 1963 as a Clerk. Thereafter he was transferred to Jamnagar. He was served with the chargesheet dated April 6, 1976, wherein 6 different charges were levelled against him. Inquiry was held and ultimately he was removed from service on June 28, 1979. The respondent had challenged his removal from service by way of filing Regular Civil Suit No.367/79 in the Court of learned Civil Judge (SD), Bhavnagar. However, the suit was dismissed by the learned Judge on February 14, 1983 holding that the Civil Court had no jurisdiction to try the subject matter of the suit. In an appeal filed by the respondent against the decree passed by the Trial Court, District Court returned plaint Exh.1 to the respondent for presentation to the appropriate Court. Thereupon the respondent made an application to the appropriate authority for referring the dispute to the Court regarding his reinstatement in service. As required by the provisions of the Industrial Tribunal Act, conciliation proceedings were initiated by the appropriate authority and an objection was raised on behalf of the appellant that the proceedings before the appropriate authority were not competent, as the respondent had not availed of the remedy of filing an appeal under the relevant regulation. On suggestion being made by the appropriate authority, the respondent was reinstated in service by the appellant and the respondent had preferred an appeal before the authority as provided in banking regulations. The appeal filed by the respondent was dismissed, upon which dispute was raised which was referred to the Presiding Officer of the Industrial Tribunal, Ahmedabad for adjudication. The Presiding Officer of the Industrial Tribunal by his award and order dated June 21, 1994 has allowed the reference partly and set aside the order of dismissal dated June 28, 1979. The Tribunal has directed the appellant to reinstate the respondent on his original post of Clerk without backwages. That award is challenged by the

appellant in Special Civil Application No. 11031/94. The petition was placed before the learned Single Judge for admission hearing on October 27, 1994 and following order was passed :-

"Heard Mr. Anand and Mr.Rana.

Rule. Interim relief in terms of Para-8. Liberty to the respondent, to apply, if he deems it fit under section 17B of the Industrial Disputes Act, 1948. Hearing expedited.

Dt. 27.10.94 (H.L.Gokhale,J.)"

3. We may state that in Para-8 of the petition, the appellant had prayed to stay implementation and operation of the award rendered by the Tribunal. As liberty was reserved to the respondent to apply for relief as provided under section 17B of the Industrial Disputes Act, 1948, the respondent filed Civil Application No. 625/95 and prayed the Court to direct the appellant to pay salary together with allowances to him during the pendency and final hearing of the petition.

4. An affidavit-in-reply was filed by Mr.Navinchandra R. Vaghela, Deputy Manager of the appellant - bank. In the said reply it was mentioned by him that he was asked to investigate the claim of the respondent regarding his non-employment during the pendency of the proceedings before the Industrial Tribunal and his investigation revealed that the respondent was carrying on number of businesses in the name of his wife, daughter and brothers. It was averred in the reply that the respondent was not unemployed at all and was acting on behalf of Appolo Industries, which is formally in the name of his brother Jagdishbhai D.Dave. He produced copy of report submitted by him to the bank authorities at Annexure-B with his reply. What was claimed in the reply was that as the respondent was gainfully employed, the application should be dismissed.

5. The respondent had filed an affidavit-in-rejoinder disputing the contents of the affidavit-in-reply and reiterating what was stated by him in the application. He had also filed an affidavit mentioning inter-alia that the three units referred to by Mr. Vaghela were closed since long.

6. After hearing the learned Counsel for the parties, the learned Single Judge by order dated June 28, 1995 has directed the appellant to pay to the respondent full wages last drawn by him inclusive of all allowances admissible to him under the rules from the date of award

i.e. June 21, 1994 till date, giving rise to the present appeal.

7. Mr. D.C.Raval, learned Counsel for the appellant submitted that the report submitted by Mr. Vaghela, the then Deputy Manager of the appellant-bank clearly establishes that the respondent was doing three different businesses in the names of his brothers, daughter as well as mother and, therefore, application submitted by the respondent under section 17B ought to have been dismissed by the learned Single Judge. It was claimed that the report further indicated that correspondences in the names of M/s. Gayatri Cast, M/s. Appollo Industries and M/s. R.J. Industries which are being run by the relatives of the respondent were received by the respondent at his residential address, which indicated that the respondent was doing business in the names of others and, therefore, relief under section 17B should not have been granted to the respondent. What was highlighted by the learned Counsel for the appellant was that as per the report, the respondent was earning substantial amount from the businesses and as he was gainfully employed, order passed by the learned Single Judge granting relief to him under section 17B should be reversed. It was also pleaded by the learned Counsel for the appellant that Mr. Vaghela, the then Deputy Manager of the appellant - bank, who had investigated the matter, had no enmity or bias against the respondent and, therefore, report submitted by him ought to have been accepted by the learned Single Judge.

8. Mrs. M.S.Sharma, learned Counsel for the respondent submitted that the appellant has failed to discharge burden of proof cast by section 17B and, therefore, the learned Single Judge was justified in granting relief to the respondent under section 17B of the Act. It was pleaded by the learned Counsel for the respondent that evidence produced by the appellant does not establish that the respondent was gainfully employed and, therefore, the appeal should be dismissed.

9. We have heard the learned Counsel for the parties at length. We have also taken into consideration the relevant documents which were produced on record of Civil Application No. 625/95. Section 17B is intended to give relief to all workmen who have been directed to be reinstated by the Labour Court, Tribunal or National Tribunal and against whom proceedings are taken in the High Court by challenging the award. Under the provisions of section 17B, there is statutory conferment of certain benefit of payment of wages during pendency of the proceedings in the High Court. The object of section

17B of the I.D.Act is to enable workman to receive full wages last drawn by him to sustain himself to resist the litigation carried on to the High Court by the management. Once workman files an affidavit of non-employment, burden of proof shifts to employer for proving employment. Therefore, the short question which arises for consideration of the Court in the present appeal is whether the appellant has discharged the burden of proof cast by section 17B of I.D.Act ? In order to establish that the respondent is gainfully employed, the appellant has relied on report submitted by Mr. Vaghela who was the then Deputy Manager of the appellant-bank. A bare reading of the report makes it manifest that Mr. Vaghela has not indicated in his report as to from whom he had received the information to the effect that the respondent was doing three different businesses in other persons' names. In the report it is specifically stated that the respondent is not dealing directly anywhere in his own name. At another place in the report it is mentioned that the respondent is not directly involved in any of the firms which are being run by his relatives. No direct evidence has been produced by the appellant which would establish that the respondent is doing three businesses in the names of his relatives. At the best the report indicates that during forced absence, the respondent who is living with his relatives, was attending some work relating to business being carried on by his relatives. In *Rajinder Kumar Kindra v. Delhi Administration through Secretary (Labour) and others*, AIR 1984 S.C. 1805 the Supreme Court has construed provisions of Schedule 2 Item 3 of the Industrial Disputes Act, 1947. In the said case, it was found that employee during forced absence for maintaining his family was helping his father-in-law in his coal depot and living with him having no other source. The Supreme Court has held that helping father-in-law in his coal depot during forced absence, cannot be said to be gainful employment and the employee was entitled to full backwages with all consequential benefits. Applying this principle to the facts of the case, it will have to be held that respondent cannot be said to have been employed gainfully. The affidavit filed by the respondent on June 23, 1995 shows that three units which are referred to by Mr. Vaghela in his report were sealed by the Bank because dues of the bank could not be paid. It is also mentioned therein that suits were filed by the Bank for recovery of amounts due against the proprietor/partners of the three units which are referred to by Mr. Vaghela in his report. According to the respondent, 4 suits which were instituted by the bank are concluded and the amounts due have been partly paid to the bank. The

respondent has mentioned in his affidavit that a letter was received from the Sales Tax Officer in connection with Apollo Industries indicating that the said Industry was closed. We may state that no reply was filed by the appellant to the affidavit which was filed by the respondent on June 23, 1995. In view of the averments made by the respondent in his affidavit dated June 23, 1995, we are of the opinion that it is not established by the appellant to the satisfaction of the Court that the respondent was gainfully employed as contemplated by section 17B of the I.D.Act. Under the circumstances, we are of the view that the learned Single Judge was justified in holding that it is not proved by the appellant that the respondent is carrying on number of businesses in the names of his daughter and brothers. It is true that Mr. Vaghela, Deputy Manager of the appellant-Bank, who had investigated the matter, has no animosity with the respondent, but that does not mean that what is stated in the report should be accepted as true. The evidenciary value of the report submitted by Mr. Vaghela will have to be assessed by the Court and looking to the contents of the report it becomes evident that the report is nothing more than hearsay evidence. Having regard to the facts of the case, we are of the opinion that the learned Single Judge was justified in concluding that the investigation carried out by Mr.Vaghela is based on assumption and surmises. Under the circumstances, no case is made out by the appellant to interfere with the order which is impugned in the present appeal. The appeal, therefore, deserves to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed, with no order as to costs.

(patel)